

No. 12,348

IN THE  
United States Court of Appeals  
For the Ninth Circuit

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TOWN OF FAIRBANKS, ALASKA (a Municipal Corporation),

*Appellant,*

vs.

UNITED STATES SMELTING, REFINING  
AND MINING COMPANY, INC., and  
CHARLES SLATER,

*Appellees.*

BRIEF FOR APPELLANT.

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**FILED**

FEB 20 1950

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**BRIEF FOR APPELLANT.**

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The Town of Fairbanks, a municipal corporation, filed in the District Court for the Territory of Alaska, Fourth Division, its petition for the annexation of certain lands contiguous to its north boundary. The United States Smelting, Refining and Mining Company, a Maine Corporation, and Charles Slater, owners of property within the area affected by the proposed annexation appearing in the proceeding, in due course filed answers as protestants, and the cause was set for trial. The petition was filed under the authority of A.C.L.A. 16-1-21 to 16-1-28. Petitioner made a *prima facie* case under authority of Chapter 50, Laws

of Alaska 1947, codified as the last paragraph of A.C.L.A. 16-1-22, and rested, whereupon on motion of protestants for nonsuit, the petition was dismissed by the Court.

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### **JURISDICTIONAL STATEMENT.**

The District Court for the Territory of Alaska is a court of general jurisdiction (A.C.L.A. 53-1-1) in civil, criminal, equity and admiralty cases. The United States Court of Appeals (Ninth Circuit) has appellate jurisdiction to review by appeal the final decisions of the District Court of Alaska. (28 U.S.C. 1291, 1294.)

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### **STATEMENT OF ISSUES.**

#### **The Legislative Acts.**

The legislative acts governing this proceeding, so far as pertinent to the issues herein, are codified in A.C.L.A. as the following sections:

“16-1-21. ANNEXATION OR EXCLUSION OF TERRITORY AUTHORIZED. Any Territory not heretofore incorporated as a city but lying contiguous to any such corporation may be annexed thereto in the manner hereinafter provided, and when so annexed shall become a part of such city and be subject to all its laws and ordinances; provided that whenever such unincorporated territory is separated from any city by water or by tide or shore

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(NOTE): Appellant was petitioner below; appellees protestants. All emphasis in this brief is ours unless otherwise indicated.

lands, said unincorporated territory shall be deemed contiguous for all the purposes of this Act; and any territory within the corporate limits of any municipal corporation may be excluded therefrom in the manner hereinafter provided."

"16-1-22. PETITION, HEARING AND ORDER FOR ELECTION: PERSONS PRESUMED OWNERS OF PROPERTY.

Whenever the *council of any city shall desire* to enlarge the limits of said city by annexing the territory contiguous thereto, *they shall file* in the district court for the judicial division wherein the city is located, a *petition signed by a majority of the owners* of substantial property interests in land or possessory rights in land, tidelands or improvements upon land or tideland within the limits of the territory so proposed to be annexed, setting forth by metes and bounds the territory sought to be annexed to such city, *and there shall be attached thereto* a plat based upon an actual survey by a competent surveyor *setting forth* the limits and boundaries of the territory to be annexed by metes and bounds *and stating* the number of inhabitants therein, *as well as* the number of owners of property therein situate and such other facts as the court may require. Said petition shall be sworn to on behalf of the city and by at least one of the property owners herein provided for. Said petition may be presented in open court or to the judge of said court in chambers and said judge shall fix a time and place of hearing on the petition and shall cause notice of said hearing to be posted in at least three of the most public places in such city and in three places within the territory sought to be annexed, and if a newspaper be published in said city, then to

publish such notice at least three times in such paper. Such notices shall be posted at least four weeks before the hearing and the first publication of such notice in the newspaper shall be at least four weeks before the hearing. *The court shall make diligent inquiry as to the reasonableness and justice of the petition, and if the court be satisfied from proofs and evidence that no private rights will be injured by granting the petition and if it is just and reasonable that the annexation take place, the court shall, unless it be shown that the petition is not bona fide or that one or more of the signers thereto are not owners of substantial property rights as herein provided or fails to comply with the requirements of this act in any other respect, order an election.*

*“Those owners of land within the limits of the territory sought to be annexed who have filed a statement of their ownership in United States General Land Office for the District in which the land is situate, in compliance with Chapter 49 of the Session Laws of Alaska, 1945, (Sections 22-2-1—22-2-18 herein), shall be presumed to be the owners of substantial property interests in land or possessory rights in lands, tidelands or improvements upon land or tidelands within the limits of the territory proposed and sought to be annexed in the absence of a clear showing to the contrary.”*

The last paragraph (italicized above) of Section 16-1-22 was adopted by the legislature in 1947 (Chapter 50 L. Alaska, 1947); and Chapter 49 of the Laws of Alaska, 1945, insofar as the same refers to registration, is set forth as Appendix I to this brief.

### The Pleadings.

The petition (Tr. 2-19) and the determination of the Common Council (Tr. 20-21) follow the language of the act in its specification of the *contents* of such a petition, identifying the town, describing the area to be annexed by metes and bounds, alleging the number of inhabitants of the area, that the petition is supported by a majority owners, a statement of the reasons for annexation, and the following statement—at issue on this appeal.

#### “IV.

*“There are 282 owners of substantial property interests in land or possession in land or improvements upon land in the Territory above described and sought by this petition to be annexed to the Town of Fairbanks, Alaska.”*

All of the allegations of the petition, excepting a description of petitioner, and specifically including said paragraph IV are *directly denied* by protestant United States Smelting, Refining and Mining Company, Inc. (Tr. 25) and Charles Slater (Tr. 31). The *protestant Charles Slater* by way of affirmative allegation, in addition to his denials, alleges:

#### “V.

Protestant alleges that there are more than three hundred and ten (310) owners of substantial property interests in land or possessory rights in land, tideland or improvements upon land or tideland within the limits of the territory described in said Petition and proposed to be annexed to the Town of Fairbanks, Alaska.”

In replying to the answer of Charles Slater the foregoing allegation is denied by petitioner. (Tr. 36.)

**The Evidence.**

The trial was brief, and all the evidence is in the record. (Tr. 63-133.) In addition to adequate proof of the reasonableness and justice of the petition, that no private rights would be injured by granting the petition, and that it is just and reasonable that annexation take place, about which there is no controversy on the appeal, appellant established by its evidence:

A. That the *number of owners of property therein situate* on the date of the filing of the petition was in fact 206 (Tr. 122-125, excluding Alden Wilber holding under contract), *under the presumption* contained in the statute, that being those owners within the area sought to be annexed who registered in the General Land Office under Chapter 49, Session Laws of Alaska, 1945.

B. That the petition is supported by the signatures of 106 (Tr. 81) persons presumed to be owners of substantial property interests in land or possessory rights in land, tidelands or improvements upon lands or tideland within the area proposed to be annexed, as defined by the statute. (Tr. 81-84, 122-123.)

### SPECIFICATION OF ERROR.

Appellant will rely for this appeal upon the following error:

1. That the District Court erred in granting appellees' motion for a nonsuit and in ordering the petition dismissed. (Assignments of Error, Tr. 48-53.)

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### ARGUMENT.

The statute for annexation requires that the Council

“\* \* \* file in the district court \* \* \* a petition signed by a majority of owners \* \* \* and there shall be attached thereto a plat \* \* \* setting forth \* \* \* and stating the number of inhabitants therein, as well as the number of property owners therein \* \* \* the court shall, unless it be shown that the petition \* \* \* fails to comply with the provisions of this act in any other respect, order an election \* \* \*

“These owners \* \* \* who have filed a statement \* \* \* *shall be presumed to be owners* \* \* \*”

The petition, verified on information and belief, does allege that there were 282 owners within the area. The pleadings deny this to be true, excepting *one protestant* affirmatively alleges it to be a greater figure. The proof was that 207 persons had “filed a statement \* \* \*”.

Appellees, in their motion for nonsuit, took the position that, as we had alleged 282, and one appellee had affirmatively alleged there were 310 (Tr. 130), they *had thus admitted* that there were at least 282

owners in the area, that we were thus bound by the pleading, and had not established, by our proof of support by 106 registered owners, that the petition was supported by a majority. (Tr. 128-130, 131-132.)

We took the position that statute controlled the presumptive number of owners, that the pleading was a mistake to that extent and amended to conform to the proof, and that the number was a matter in issue for the sole purpose of testing if the petition was supported by a majority. (Tr. 130-131.)

The Court said:

“\* \* \* Well, their allegations were 282 owners of substantial property interests. Why, naturally, it is up to them to prove that. The fact that they showed there were 207 who registered, shows that there were that many that registered, but it doesn't show that there are others who owned interest in the area and who have failed to register, so the motion is well taken and will be granted. The petition is dismissed.”

The argument of appellant demonstrating the error of the Court falls logically into development of the following three propositions:

A. The annexation statutes create a valid presumption that persons in the affected area who have registered their titles are all that are entitled to be considered interested; and that the burden is upon appellees to make a clear showing to the contrary.

B. A variance in proof from a statement of fact as to number of owners is an annexation pe-

tition that is not in itself a material issue forms no foundation for nonsuit.

C. The variance between the pleadings and the proof is such as is directed by the statutes to be disregarded by the Court in arriving at a decision on the material issue.

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## I.

**THE ANNEXATION STATUTES CREATE A VALID PRESUMPTION THAT THOSE PERSONS IN THE AFFECTED AREA WHO HAVE REGISTERED THEIR TITLES ARE ALL THAT ARE ENTITLED TO BE CONSIDERED INTERESTED; AND THAT THE BURDEN IS UPON APPELLEES TO MAKE A CLEAR SHOWING TO THE CONTRARY.**

The petition must be supported by the signatures of "a majority of the owners of substantial property interests in land or possessory rights in land, tidelands or in improvements on lands or tidelands within the limits of the Territory so proposed to be annexed \* \* \*". This classification, without further definition, existed prior to 1947.

Obviously to determine the number that is a majority of a class one must count the class. How, then, is one to measure a "substantial" interest? What is a "possessory" interest that is "substantial", etc.

Prior to 1945 there was not in Alaska any real property roll outside incorporated municipalities. There was no system of territorial realty taxation. There was no record to which the Court could be referred for an official, exact or even presumptive

“count” of the class. The statute then posed a grave issue of fact and legal definition in determining the number constituting the class.

In the 1945 session of the legislature the first roll of real property owners in Alaska was proposed. (Chapter 49, Session Laws, 1945.) This act required a registration; and became effective on the General Land Office setting up machinery therefor.

By 1947, the next session of the legislature, there was in existence a roll of owners of real property located outside incorporated municipalities. The legislature, presuming compliance with its registration act, then had available a record source of information as to “property owners” that could be used in an annexation case. They then passed the act (L. 1947, Chapter 50), effective March 20, 1947, that became the last paragraph of A.C.L.A. 16-1-22:

“Those owners of land within the limits of the territory sought to be annexed who have filed a statement of their ownership in the United States General Land Office for the District in which the land is situate, in compliance with Chapter 49 of the Session Laws of Alaska, 1945 (Sections 22-2-1—22-2-18 herein), shall be presumed to be the owners of substantial property interests in land or possessory rights in land, tidelands or improvements upon land or tidelands within the limits of the territory proposed and sought to be annexed in the absence of a clear showing to the contrary.”

As Justice Murphy said in *U. S. v. Rosenblum Truck Lines*, 315 U.S. 53:

“The question here, as in any problem of statutory constructions, is the intention of the enacting body.”

See also:

*Femmer v. City of Juneau*, 9 Alaska 315, 97 F. (2d) 649;

*U. S. v. Stromberger*, 9 Alaska 689.

The logical interpretation of the amendment is that it changed the act to require the filing of a petition supported “\* \* \* by a majority \* \* \* of those owners of land within the limits of the territory sought to be annexed who have filed a statement of their ownership \* \* \* in compliance with Chapter 49 of the Session Laws of Alaska, 1945 \* \* \*”. Proof of that factor is seemed sufficient to sustain the petition in the absence of “\* \* \* a clear showing to the contrary.” The statutory presumption is not conclusive, and is refutable; and efficiently shifts the burden of proof to the appellees.

Such statutes in proper cases have received judicial approval as being within the province of the legislature. In this respect Hughes, C. J., said in *Bandini Co. v. Superior Court* (1931), U.S. 8, at page 18:

“The appellants make the further contention that the statute is invalid because of the provision of section 8b (supra p. 10) that ‘the blowing, release or escape of natural gas into the air shall be *prima facie* evidence of unreasonable waste.’ The State, in the exercise of its general power to prescribe rules of evidence, may provide that proof of a particular fact, or of several facts taken collectively, shall be *prima facie* evidence

of another fact when there is some rational connection between the fact proved and the ultimate fact presumed. The legislative presumption is invalid when it is entirely arbitrary, or creates an invidious discrimination, or operates to deprive a party of a reasonable opportunity to present the pertinent facts in his defense. *Mobile, J. & K. C. R. Co. v. Turnipseed*, 219 U.S. 35, 43; *Bailey v. Alabama*, 219 U.S. 219, 238; *Lindsley v. Natural Carbonic Gas Co.*, *supra*, at pp. 31, 82; *Manley v. Georgia*, 279 U.S. 1, 5, 6; *Western & Atlantic R. Co. v. Henderson*, 279 U.S. 639, 642. In the present case there is a manifest connection between the fact proved and the fact presumed \* \* \*"

The Supreme Court in *Campbell v. Laclede Gas Company* (1886), 119 U.S. 446, had under review the following Missouri statutes:

"Section 3826. All patents for land lying within the State of Missouri granted to any person or persons by the President of the United States or the governor of this State, may be recorded in the office of the recorder of the county in which the lands are situated."

"Section 3827. All copies of patents so recorded, or which may have heretofore been recorded, duly certified by the recorder under his official seal, shall be received in all courts in this State as prima facie evidence of the contents of such patents."

The original patent was not available, and there was an attempt to impeach the county recorder's copy by a copy from the land office in Washington. Defend-

ants relied on Rev. Stat. Sect. 891. The Court, in conclusion, said at page 448:

“That the State of Missouri had a right to pass the statute which makes the record in the offices of that State of a patent from the United States *prima facie* evidence of the contents of that patent, does not seem to be doubted. Indeed, it was a very wise and needful provision; for without it the title to large quantities of land, which rested primarily in the patents from the United States, might be very difficult to establish by evidence of that title. By this statute parties were enabled to place this evidence in permanent form upon the records of the counties in which the land was situated, at the same time giving notice to all the world of their claim to such land.”

Page 449:

“\* \* \* The words ‘evidence equally’, as used in the act of Congress, were not intended to mean that *in all* cases the copy should have the same probative force as the original instrument, but that it should be regarded as of the same class, in the grades of evidence, as to written and parol, and primary and secondary. It could not have been intended to say that when the existence of the instrument is conceded, but a question arises as to some particular word or figure, the copy would be as convincing as the original.

“On the whole, we are of opinion that the *prima facie* case made by the record of the patent in the recorder’s office of St. Louis County is not overcome by what purports to be a copy of the same from the records of the General Land Office in Washington, and that the judgment of the Supreme Court of Missouri must be *Affirmed*.”

The telling reasons for a "record" in the *Campbell* case are equally present in the instant case. Certainly as to those persons entitled to participate in an annexation proceeding, and the use of a public record adaptable to that purpose, is clearly within the province of the legislature to provide by statute.

Courts must give full weight to valid statutes. In constructing or interpreting statutes so as to give full weight thereto the purpose of the act must be accorded recognition and the intent of the legislature given full effect.

"In this case, as in every other involving the interpretation of a statute, the intention of Congress is an all important factor. The greatest light is thrown on that intention in this case by an examination of the existing conditions and the anticipated evils against which by this legislation Congress sought to protect the country." *U. S. v. Stone & Downer Co.* (1927), 274 U.S. 225, 239.

See also:

*Armstrong v. Nu-Enamel Corp.*, 305 U.S. 321;  
*Wis. C. R'd. Co. v. Forsythe*, 159 U.S. 55.

Justice Reed recently restated judicial guides to the interpretation of statutes in *U. S. v. American Trucking Ass'ns.* (1940), 310 U.S. 534, at page 542:

"In the interpretation of statutes, the function of the courts is easily stated. It is to construe the language so as to give effect to the intent of Congress. There is no invariable rule for the discovery of that intention. To take a few words from their context and with them thus isolated to attempt to determine their meaning, certainly would not con-

tribute greatly to the discovery of the purpose of the draftsman of a statute, particularly in a law drawn to meet many needs of a major occupation.

“There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning. When the meaning has led to absurd or futile results, however, this court has looked beyond the words to the purpose of the act. Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one ‘plainly at variance with the policy of the legislation as a whole’ this court has followed that purpose, rather than the literal words. When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no ‘rule of law’ which forbids its use, however clear the words may appear on superficial examination. The interpretation of the meaning of statutes, as applied to justiciable controversies, is exclusively a judicial function. This duty requires one body of public servants, the judges, to construe the meaning of what another body, the legislators, has said. Obviously there is danger that the courts’ conclusion as to legislative purpose will be unconsciously influenced by the judges’ own views or by factors not considered by the enacting body. A lively appreciation of the danger is the best assurance of escape from its threat but hardly justifies an acceptance of a literal interpretation dogma which withholds from the courts available information

for reaching a correct conclusion. Emphasis should be laid, too, upon the necessity for appraisal of the purposes as a whole of Congress in analyzing the meaning of clauses or sections of general acts. A few words of general connotation appearing in the text of statutes should not be given a wide meaning, contrary to a settled policy, 'excepting as a different purpose is plainly shown.' "

See also:

*U. S. v. Cooper*, 312 U.S. 600.

The Alaska Courts adopt these, and the following rules of statutory construction (page 267):

"(12) It should also be borne in mind that the statute which we are particularly called upon to construe is an amendment to an existing statute, and that the rule in this regard is that:

" 'Amendments are to be construed together with the original act to which they relate as constituting one law, and also together with other statutes on the same subject, as part of a coherent system of legislation \* \* \* The provisions of the amendatory and amended acts are to be harmonized, if possible, so as to give effect to each, and leave no clause of either inoperative.' 59 C.J., Section 645, pp. 1094, 1095.

" 'The amendatory and the original statutes are to be read together in seeking to discover the legislative will and purpose, and if they are susceptible of two constructions, one of which gives effect to the amendatory act while the other will defeat it, the former construction should be adopted.' 25 R.C.L. Section 291, p. 1067; Burling-

ton C. & N. R. Co. v. Dey, 82 Iowa 312, 48 N.W. 98, 12 L.R.A. 436, 31 Am. St. Rep. 477.

“ ‘Obviously, in order that effect may be given to every part of an act in accordance with the legislative intent, all the language of the act must be considered and brought into accord.’ 25 R.C.L. Section 247, p. 1006.” *U. S. v. Hardcastle* (1942), 10 Alaska 254, 267 and 268.

See also :

*U. S. v. Dasher* (1940), 9 Alaska 719, 729.

A proper concept of the legislative intent can be realized from a reading of the entire statute (sections other than 16-1-21 and 16-1-22 are set out in the Appendix). The legislature intended that:

1. Before the *advisability* of annexation be *considered*

a. A *majority* of the persons (owning property) likely to be affected by municipal taxation signify *tentative approval* by signing a petition; and

b. The City Council signify *tentative approval* for the people of the City by ordering the petition filed.

2. The Court based upon a showing of *these tentative approvals* may then consider the *advisability of the proposed annexation* with its attention directed by the statute to possible injury to private right, and the reasonableness and justice of the proposed annexation.

3. With Court approval of the advisability of annexation the *actual annexation* is then *affected by the favorable vote of property owners* (the persons most directly affected by the proposed change) both *within* the municipality and within the area to be annexed.

See:

*In re Town of Sitka* (1946), 11 A. 201.

There exists no legislative or constitutional requirement that the procedure for annexation take any particular form. In fact it is most often accomplished by an administrative procedure. That the legislature could have authorized the city to file a petition *without* signatures of persons owning property in the area affected is academic. The choice in defining the class of persons as *only* those who had registered their title is also one solely for the legislature. Had that been done, the Courts would be bound thereby. That the legislature provided for a rebuttable presumption only accomplishes the same purpose as a conclusive classification as far as affects the petitioner—for the statute itself places the burden of overcoming the presumption on the objectors.

It is obvious that the first step in annexation above noted is *tentative*. It is equally obvious that the legislature passed the amendment in 1947 to overcome the onerous burden of highly technical interpretations of the language of the act and facilitate the procedure leading to an election by defining the class. In an earlier proceeding involving the same area the

same Court ruled that testimony by one who had made a "last record owner" search of the real property records was incompetent to show even a "claim of ownership" unless coupled with proof of actual possession by the last record owner; and if the property was vacant he indicated he would quite likely hold an abstract of title necessary to make proper proof. Such a burden of proof was not the original legislative intent; and the amendment, probably consequent of the previous case, is the legislative design to facilitate the showing of a "petition by a majority".

The Court in stating:

"The fact that they showed there were 207 registered, shows that there were that many who registered, but it does not show that there are others in the area who owned interests in the area and who failed to register \* \* \*"

completely ignores the presumption created by the statute that those *who have registered* are *all the owners* entitled to sign such a petition "*in the absence of a clear showing to the contrary.*" It is not incumbent upon petitioners to make a "clear showing" contrary to a presumption created in their favor! *U. S. v. Hardcastle* (1942), 10 Alaska 254.

## II.

A VARIANCE IN THE PROOF FROM A STATEMENT OF FACT IN AN ANNEXATION PETITION THAT IS NOT IN ITSELF A MATERIAL ISSUE IS NOT FATAL, AND FORMS NO FOUNDATION FOR NONSUIT.

The Court also stated in granting the motion of appellees:

“\* \* \* Well, their allegations were 282 owners of substantial property interests. Why, naturally, it is up to them to prove that \* \* \*”

The error of the Court becomes obvious when we consider that had the proof *positively shown* that the petition was supported by 280 signatures by property owners, and that there were 281 owners in the area, *and none others*, the petition would have failed for lack of proof of the *allegation* of 282 owners! The same logic controls in both this instance and in the supposition; and the *whole legislative intent thereby defeated*.

The error of the Court was in looking upon the statement in the “petition” as an “allegation”. *This is clearly contrary to the intent of the statute!*

“Allegations” are statements by a pleader of an ultimate fact subject to proof upon which he relies for relief. The “allegation”, or ultimate fact in issue, in this case is “that the petition is supported by a majority”. The *number* is immaterial and cannot be considered an allegation. It matters not if it be proved to be 100, 207, 282, 310 or 3,100. The only materiality it has is that it is a “*fact*” (in issue) which must be

determined in order only to measure proof of the ultimate fact: the signatures of a majority.

The basis of the petition is “*support by a majority*”. Just so is the basis of an action in debt *an obligation owing from the defendant*. Is a plaintiff in a debt action, although he has alleged the debt to be \$100.00, to be deprived relief because his proof was not exact, and only established the debt to be \$90.00?

Insofar as the statute requires a statement of the “number of owners \* \* \*” it is requiring only an informative observation, and not a pleading. *It is not required that it be set forth in the petition*, but only that it be *stated* on the plat! In that the *number* of persons is a fact to be found by the Court from the evidence after resolving the contentions of the parties, it is manifestly impossible to ever state the figure exactly as the Court will ultimately find.

But most important is the fact that the figure, when found, is *used by the Court only*, and only to assist it in determining the ultimate fact of compliance by proof of the signatures of a majority. There are no minimums or maximums by the statute made jurisdictional. The “figure” plays no part in any conclusion by the Court, any findings by the Court, or in any election ordered by the Court.

The manifest intent of the legislature is that the statement be made to appraise the Court and possible protestants of the approximate number of separate ownerships involved in the proposed annexation. The reason for such a statement could as well be that of a fact of interest to the Court in determining the reason-

ableness of the annexation as in having any relation to *proof of signatures by a majority*.

Should the statement in the petition that there are 282 owners within the area proposed to be annexed be considered a pleading or "allegation", then the pleading should be considered amended to conform to the proof. It should be noted that appellant took the position before the lower Court that the pleading *was amended* by the proof and should be treated as amended by the Court in deciding the motion. No *formal* request to make a *formal amendment on the record* was made by counsel; and the record shows that *after understanding the position of appellant* the Court rules without commenting on whether he deemed the pleadings amended, and without allowing any time for amendment. *He ruled and left the bench.*

The position of appellant was made clear to the Court. The parties were before the Court ready with their evidence. If the Court was of the opinion the "allegation" controlled he should at least have afforded an opportunity for amendment; and in view of the obvious reliance by appellant on a *prima facie* showing at least have offered an opportunity to re-open, if not actually under a duty to do so. This Court established in *Ringstad v. Grannis* (1947), 189 F. (2d) 289, 11 Alaska 269, that "A lawsuit is not a game between opposing counsel."

## III.

THE VARIANCE BETWEEN THE PLEADINGS AND THE PROOF IS SUCH AS IS DIRECTED BY THE STATUTES TO BE DISREGARDED BY THE COURTS IN ARRIVING AT A DECISION ON THE MATERIAL ISSUE.

The difference between the "allegation" of 282, and the proof of 207 owners is one of degree. This is a variance of the proof from the pleadings, the effect of which is governed by the provisions of A.C.L.A. Sections 55-5-71, 72, 73, 76 and 81. The entire opinion of this Court written on petition for rehearing in *Balanbanoff v. Kellogg* (1940), 118 F. (2d) 597, 599; 10 Alaska Reports 11, 18 is set forth as a concise and cogent comment on the foregoing sections:

"Healy, Circuit Judge

"(7, 8) Appellant has petitioned for rehearing. The chief proposition urged in support of the petition is that the court lacked power to treat the complaint as amended to conform to the proof. Petitioner says that the governing rule is contained in section 3456, Compiled Laws of Alaska, 1933, and that this statute requires that the amendment be made before submission of the case.

"Rule 15(b) of the Rules of Civil Procedure, 28 U.S.C.A. following section 723c, provides in part: 'When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to

raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues.'

"Whether the federal rules are applicable to trials in Alaska we need not inquire. This particular rule is merely an application of the principle prevailing generally in the states and territories having systems of code pleading. The Alaska statutes, as found in chapter 78, sections 3451 et seq. of the 1933 Code, are in the main identical with those of the code states. Section 3451 provides: 'No variance between the allegation in a pleading and the proof shall be deemed material, unless it shall have actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits \* \* \*'. Section 3452 states 'When the variance is not material, as provided in the last section, the court may direct the fact to be found according to the evidence, or may order an immediate amendment, without costs.' And Section 3461 provides that 'The court shall, in every stage of an action, disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the adverse party.'

"The view here expressed is fully supported by *Black v. Teeter*, 1 Alaska 561, at pages 564, 565.

"Rehearing denied."

(These sections in A.C.L.A. are: 3456—55-5-76; 3451—55-5-71; 3452—55-5-72; 3461—55-5-81.)

In quoting Section 3451 (A.C.L.A. 55-5-71) the last sentence was omitted in the opinion. The entire section is:

“55-5-71. VARIANCE. WHEN MATERIAL: PROOF: ORDERING AMENDMENT. No variance between the allegation in a pleading and the proof shall be deemed material, unless it shall have actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits. Whenever it shall be alleged that a party has been so misled, that fact shall be proved to the satisfaction of the court, and in what respect he has been misled; and thereupon the court may order the pleading to be amended upon such terms as shall be just.”

In the instant case appellees certainly cannot complain that they were misled. One of them alleges that there were more than 310 owners in the area, proof of which would leave the petition unsupported by the signatures of a majority. Mr. Hurley in his argument says (Tr. p. 132):

“\* \* \* according to our figures they had to have 155 signers to have a valid petition. *People we have checked on and know* have valid property interests in land and they are entitled to vote, or were entitled to sign the petition.”

Certainly the appellees were prepared for proof on the issue. From the very nature of the issue they had to know the *name and claimed ownership* of each individual possible to count. When we proved, as an illustration, 107 *identified individuals* who signed as

being qualified they must prove 108 *different individuals*, who *did not* sign, equally qualified in order to defeat the petition. With a petition supported by 144 signers they must prepare proof:

(a) That certain signers had no right to sign;  
and

(b) That more than rightfully signed had a right to sign but failed to do so.

They would block our every effort to show any signer to have any interest in the area to be annexed: then facilitate showing any title in those who had not signed.

It is likewise obvious from the very nature of the proceeding that the petitioner would not be prudent in relying solely on the presumption in filing a petition. It must anticipate that there are owners who have failed to register, and that a protestant may be able to add to the number of persons registered others “\* \* \* by a clear showing \* \* \*”. Thus, to be prudent, it must support its petition by the signatures of a majority *as well of those who failed to register but that might possibly by the Court be held to be entitled to sign*. That such prudence should estop appellant from the benefits of the presumption is to defeat the purpose of the presumption.

To urge that the proof must *exactly fit the allegation* of 282 without variation is to also permit the defeat of the petition upon a showing by appellees of 283, without regard to uncontroverted proof of more than a majority of 283. A variance one way should

logically be no different, or any less fatal than one the other way.

The position of appellant can be restated in the language of the Court in *Jacques v. Fourthman* (Penn. 1890), 20 Atl. 802, 803:

“Green, J. The court below having granted a compulsory nonsuit, and refused to take it off, the evidence given by the plaintiff must be taken to be true, together with every inference of fact which the jury might lawfully draw from it. *Miller v. Bealer*, 100 Pa. St. 585; *McGrann v. Railroad Co.*, 111 Pa. St. 171, 2 Atl. Rep. 872; *Jones v. Blanc*, 116 Pa. St. 190, 9 Atl. Rep. 275. A peremptory nonsuit is in the nature of a judgment for defendant on demurrer to evidence, and if there is any evidence, no matter how slight, if it is more than a mere *scintilla*, which alone would justify an inference of the disputed facts on which the plaintiff’s right to recover depend, it must be submitted to the jury.”

The motion in the instant case is a demurrer to the petition *and the evidence*. The petition alleges it is supported by a majority. *So far as the proof goes it shows just that!* The proof is not controverted, and by the motion admitted to be correct. This is certainly no failure of proof as defined by A.C.L.A. 55-5-73:

“55-5-73. FAILURE OF PROOF. When, however, the allegation of the cause of action or defense to which the proof is directed is unproved, not in some particular or particulars only, but in its entire scope and meaning, it shall not be deemed a case of variance within the last two sections, but a failure of proof.”

and the error in the statement of the number of persons in excess of the proved registrants is a defect. A.C.L.A. 55-5-81 decrees:

“55-5-81. DISREGARD OF DEFECTS. The court shall, in every stage of an action, disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the adverse party.”

It is not claimed, nor can it be claimed that any substantial right of appellees was or could be affected.

The practical effect of the nonsuit is to force the filing of a new petition stating the number to be 207. In all other respects the pleading would be the same, and the evidence identical on a new trial. The ruling, then, is to no effect, except the very substantial one of forcing petitioner to the delay and expense of circulating a new petition, and a republication of its notice. Of course interim changes in ownership would affect some change in the evidence.

In this regard the Alaska Court in *Black v. Teeter* (1902), 1 Alaska 564, 565:

“All the substantial rights of the parties were submitted to the jury without objection. The error complained of is only technical. I am satisfied that the verdict rendered is in accord with both the law and the facts, is just and right *and would be the result of another trial*. No substantial right of the defendants is taken away or affected unjustly by the verdict, and the error or defect ought, therefore, to be disregarded by the court.”

To a similar result is the Court's opinion in *Leaman v. Thompson* (Wn. 1906), 86 P. 926, 928:

“In view of appellant's testimony as to express promises after the divorce, and of the other testimony, the above averments were broad enough to include it. But, in any event, *after the court indicated that it did not think the averment sufficient*, appellant asked leave to amend the complaint in that particular. *This, it is true, was after the plaintiff had rested, and after the motion for nonsuit was interposed but before the ruling thereon.* On the court's theory of the insufficiency of the complaint to support the testimony of a later promise, we think at least permission to amend should have been granted when it was requested. *To force appellant to submit to a nonsuit would simply send the parties out of court until a new action might be brought, when the allegations offered would be made in a new complaint. This would merely protract the litigation. The parties and the appellant's evidence were already before the court and jury.* No objection was made by respondent that the amendment would surprise him or place him at a disadvantage if the trial should proceed with the amendment made. If the amendment had been of sufficient materiality and a sufficient showing of prejudice to respondent had been made, a continuance for a time might have been granted and terms interposed against appellant. *Applying the court's own theory of the case to the record of the trial as it is brought before us, we think it was an abuse of discretion to refuse the amendment. While, as we have said, we think the complaint was broad enough when all of its allega-*

*tions were considered to cover the evidence submitted, yet when the appellant sought to conform to the court's theory and make the complaint more specific so as to unmistakably conform to the proofs submitted, the amendment should have been allowed."*

See also:

*Ringstead v. Grannis* (1947), 159 F. (2d) 289 (supra).

The force of these statutes and cases, as applied to this case, is to, under the circumstances, be mandatory upon the Court to have considered the petition amended to conform to the proof. The positive statutory direction that the Court disregard such variance, *direct the fact to be found according to the evidence or order an immediate amendment.*

In the face of appellant's statement that the allegation was in error (Tr. 130), and reliance upon the statutory presumption (T. 130-131); and appellees' stated intention to prove a greater number, (Tr. 131-132), the Court was compelled by these statutes and authorities *consider* the complaint amended to conform to the proof (that being the same as, for the purpose of a nonsuit motion, directing the fact to be found in accordance to the evidence). And if the Court was intending to rule against the existence of a presumption it was by those statutes then compelled to *order an immediate amendment.*

The failure of the Court to follow the mandate of the statutes, none of these matters being discretionary,

is error justifying this Court in reversing the order granting the motion for nonsuit and dismissing the petition.

Dated, Fairbanks, Alaska,  
February 17, 1950.

Respectfully submitted,  
COLLINS & CLASBY,  
CHAS J. CLASBY,  
*Attorney for Appellant.*

**(Appendix Follows.)**







## Appendix

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### I.

#### A.C.D.A.

22-2-1. DUTY OF OWNER OR TRANSFEREE TO FILE STATEMENT: EXEMPTIONS: PENALTY: LIEN. It shall be the duty of each owner of land, other than of land to which the United States, or an agency or instrumentality thereof holds title, or which is owned by the Territory or a subdivision, agency or instrumentality thereof, or by an Indian Nation tribe, band or a member thereof, or is located within an incorporated town, to file in the United States Land Office for the District in which the land is situated, on or before June 30, 1946, a sworn statement, or a statement signed by two witnesses when it is impossible to obtain a sworn statement, giving his name, his post office address, a description of the tract of land, its acreage, use, character, and any other information necessary for the purposes of this Act. Upon a transfer of title to a tract of land on or after January 1 of any year, a statement in the form required by this section must be filed by the owner of such newly acquired tract of land on or before December 31 of that year, unless such owner is within one of the classes exempted by this section from filing such a statement. The owner of a tract of land who has made a proper return as to such land in any year, as prescribed by this section, need not thereafter file a statement under this section. Upon failure to file a statement, as required by this

section, the owner shall be subject to a penalty of \$5 which shall be a lien against the land as of January 1 of the ensuing year, and subject to collection as hereinafter provided.

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## II.

### A.C.L.A.

16-1-23. ELECTION: NOTICE: BALLOTS: ELECTION JUDGES AND CLERKS: CANVASS: CERTIFICATE. The council of such city shall thereupon submit the question to the electors of such city and to the electors residing in the territory proposed by said petition to be annexed to such city. Such question shall be submitted at a special election to be held for that purpose, and such council shall give notice thereof, by publication in a newspaper of general circulation in such city and in such territory so proposed to be annexed or nearest thereto, for a period of four weeks prior to such election; also by posting notice thereof in three public places within such city and three public places in such territory for a like period. Such notices shall be posted and the first publication of such notice in the newspaper shall be at least four weeks before the election. Such notice shall distinctly state the proposition to be so submitted and shall designate specifically the boundaries of the territory so proposed to be annexed, and the electors shall be invited thereby to vote upon such proposition by placing upon their ballots the words "for annexation to the city of ..... " or "against annexation to the city

of .....," or words equivalent thereto. Such council shall also designate the time and place or places at which the polls will be open within such city and in such territory so proposed to be annexed, which place or places shall be those usually used for that purpose within such city and also within such territory, if any such there be. Such council shall also appoint and designate in such notice the names of the judges and clerks of election. The judges and clerks before entering upon the discharge of their duties at such election shall each take and subscribe before an officer authorized to administer the same, an oath for the honest and faithful discharge of his or her duties as such judge or clerk. In case of the absence or inability of any judge or clerk appointed to act at such election, the qualified electors present at the polls before proceeding to vote, may choose an elector to act in his or her place from among their number, who shall duly qualify as aforesaid before entering upon the discharge of his or her duties as judge or clerk at such election. Such council shall meet on the Monday next succeeding the day of such election at one o'clock p.m. and canvass the votes cast thereat, and the council shall issue under their hands, and the seal of the city, a certificate showing the number of votes cast in favor of annexation and the number of votes cast against the annexation, separately stating the number of votes for or against in the city and in the territory sought to be annexed. Said certificate together with all the ballots cast and the oaths of the judges and clerks of election shall immediately be filed with the

clerk of the district court in the proceedings, authorizing said election.

### A.C.L.A.

16-1-24. DECLARATION OF ANNEXATION. If it shall appear to the district court or the judge thereof from the certificate of election filed with the district court as aforesaid, that two-thirds of the votes cast at said election in the territory sought to be annexed were in favor of the annexation and that a majority of the votes cast in the city were also in favor of the annexation, and that the provisions of law relating to annexation have been substantially complied with, then the district judge shall by an order in writing entered in the records of the court duly adjudge and declare such annexation and the said territory shall, from thenceforth, be a part of the city. Such order shall describe the boundaries of the territory annexed and give the name of the city to which it is annexed.

### A.C.L.A.

16-1-27. FILING COPIES OF ORDER OF ANNEXATION OR EXCLUSION. Whenever the court shall by order annex any territory to a city or exclude any territory therefrom, a certified copy thereof shall be filed in the office of the Auditor of the Territory, another in the office of the commissioner of the precinct in which the corporation is situated and a third in the office of the city clerk of the city to which the territory has been annexed or from which the territory has been excluded.

## A.C.L.A.

16-1-28. QUALIFICATIONS OF ELECTORS. The qualifications of an elector for election in this Article provided for, shall be as follows: He or she shall be a person of the age of twenty-one years or more and shall be the owner of substantial property interests in land, buildings or improvements on land or tideland within said city or within the territory proposed to be annexed to or excluded from said city.

